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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1101

J. GEORGE IVLER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit entered in the above entitled cause on January 12, 1977.

Opinion Below

The judgment order of the court below directly preceding this petition is that of the Court of Appeals for the Third Circuit and is reproduced in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on January 12, 1977. This petition for writ of certiorari was filed within 30 days of that date. A stay of the issuance of the mandate until February 11, 1977 was previously granted by the Court of Appeals on January 26, 1977. This Court's jurisdiction is invoked under the authority of 28 *U.S.C.* §1254(1).

Questions Presented

1. Does the Sixth Amendment and this Court's decisions in *Bruton* v. *United States,* 391 U.S. 123 (1968) and *Barber* v. *Page,* 390 U.S. 79 (1968) compel the Government to produce a witness, who is available to the Government but not called by them, instead of relying on the hearsay testimony of another witness?

2. Does Fed. Rule of Evid. 609 (b) preclude the cross examination of the Government's principal witness about a prior conviction more more than ten years old without denying to the accused the right of confrontation secured by the Sixth Amendment?

Constitutional and Statutory Provisions Involved

This case involves the following portion of the Sixth Amendment to the United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

and

Federal Rule of Evidence 609 (b) which reads:

> "(b) Time limit.—Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence."

Statement of the Case

I. Procedural background

The petitioner, J. George Ivler, an attorney of the State of New Jersey, was indicted along with Robert J. Sorge, Louis J. Cennimo and Peter A. Crucso in an eight count indictment in the District of New Jersey on July 24, 1975. Count one charged all four defendants, along with an unindicted coconspirator, Steven Cannold, the Government's principal trial witness against them, with a conspiracy to commit mail fraud by the fire bombing of a Figure-Tone Health Spa owned by Sorge's corporation in East Orange, New Jersey and seeking to collect on the insurance proceeds. The conspiracy was alleged to have taken place between January, 1971 and May 31, 1971 with the actual fire bombing occurring at the East Orange location on February 18, 1971. Count two charged the four defendants with knowing possession of a firearm, that is, dynamite, which was not registered to them in the National Firearms Registration and Transfer Record in violation of 26 *U.S.C.* §586 (d) and 18 *U.S.C.* §2. Count three, dismissed by the trial judge at the end of the Government's case, charged the four defendants with damaging by means of an explosive the Figure-Tone Health Spa, an activity affecting interestate commerce in violation of 18 *U.S.C.* §844(i) and 2. Only Ivler and Sorge were charged in the remaining counts. Counts 4, 5, 6 and 7 were violations of the mail fraud statute and each count related to a separate insurer who had been on the risk. Count eight charged Sorge and Ivler with the wilfull and knowing use of an explosive to commit a felony, that is mail fraud, prosecutable in a court of the United States in violation of 18 *U.S.C.* §844(h) (1) and (2). Ivler entered a plea of not guitly as to all counts of the indictment on September 12, 1975.

Sorge, Ivler and Cennimo went to trial in the District of New Jersey before United States District Judge Frederick B. Lacey and a jury on December 15, 1975. The jury returned guilty verdicts on December 23, 1975 as to Sorge and Ivler on counts 1, 2, 4, 5, 6, 7 and 8. Cennimo was acquitted of the conspiracy charge in count one, but was found guilty of the possession of dynamite charge without the proper registration contained in count two.

Motions for a judgment of acquittal and for a new trial were made by Ivler and denied by the trial court on January 26, 1976 following a brief evidentiary hearing. A further motion for a new trial as an outgrowth of material submitted by the Government in opposition to the earlier new trial motion made by Ivler was denied by the trial judge on March 8, 1976. Ivler, with Sorge and Cennimo, was sentenced on March 8, 1976. On count one, the imposition of sentence was suspended as to Ivler and a probationary term of three years was imposed. Similarly, on the second count, the imposition of sentence was suspended and a probationary term of two years was imposed with the term to run consecutive with the probation term on count one. As for counts 4, 5, 6, 7 and 8, a probation of three years was imposed with the term to run concurrent with the probation fixed on the first count of the indictment. Sorge received the same sentence given to Ivler. Cennimo, convicted on count two, received a suspended sentence and three years' probation.

On March 11, 1976, Ivler filed an appeal from the whole of the judgment of conviction entered on March 8, 1976 as well as the order denying the judgment of acquittal and a new trial applications An order granting a stay of the imposition of the probationary term on Ivler was entered by the court on March 11, 1976 The judgment of the district court was affirmed on January 12, 1977 by the Third Circuit in a judgment order entered that day.

II. Factual background

Robert Sorge was the owner of a chain of Figure-Tone Health Spas located throughout parts of New Jersey. Fires of unknown origin had occurred at Figure-Tone Spas in Bloomfield, in Teaneck and finally in Watchung, New Jersey in December, 1970 (T. 702, T. 710, T. 713). ("T" designation refers to the trial transcript which is included in the record certified to this court by the Clerk of the Court of Appeals for the Third Circuit). The first two spas were not covered by insurance and the third in Watchung was under an insurance binder when the fire occurred (T. 65 to T. 66).

Prior to the fire at the Watchung location, Sorge was approached by Stephen Jee, an insurance broker, who urged that he insure his properties when he learned that they were uninsured and fires had taken place (T. 49 to T. 50). Sorge followed Jee's advice and sought to have insurance placed on his spas, including the one located in East Orange, the subject of the criminal charges involved in this case (T. 50 to T. 51). Ivler had nothing to do with the obtaining of the insurance and Mr. Jee so testified at the trial acknowledging that he did not even know Ivler (T. 87).

While the fires which struck at the Figure-Tone operation during the last quarter of 1970, were of unknown origin, several explanations for these fires were considered. One explanation centered on a competitor, European Health Spa, but there was no proof of any involvement on their part. Another possible suspect was Steven Cannold who had worked for Bond and Credit Company, the collection arm of Figure-Tone Health Spa, but was fired in the fall of 1970 when it was learned that he had used strong arm methods in making collections of settlement accounts (T. 912 to T. 913). Cannold also had made demands for money on Sorge to which Sorge did not respond (T. 707, T. 757, T. 893 to T. 894).

Cannold, who had a criminal record, knew and had been represented by Anthony F. La Duca, Ivler's law partner and, indeed, had met Ivler through his relationship with La Duca (T. 970 to T. 971). The firm of Ivler and La Duca did collection work for Figure-Tone when contracts that could not be collected upon and justified the cost of litigation were put into suit (T. 974; T. 1006).

The fire bombing that struck the Figure-Tone Spa in East Orange happened on February 18, 1971. At the time, four insurance companies were on the risk. Following the fire on February 26, 1971, Sorge retained, on Jee's recommendation, Sapperstein, Hochberg & Haberman, a firm of insurance adjusters, to represent Figure-Tone's interest on the fire loss (T. 67, 136 to 138; T. 157). Loss notices were mailed to the four carriers on March 1, 1971 (T. 145; T. 146). On May 2nd, 1971, Sidney Levine of Sapperstein, Hochberg & Haberman visited the Figure-Tone site in East Orange and estimated the value of the loss to be $5,000.00 to $5,500.00 (T. 147; T. 151) Manuel Alvarez, a self-employed insurance adjuster retained by three of the insurance companies, also viewed the site on May 2nd (T. 147). His estimate of the value of the loss was $4,135.00 (T. 178). Ivler had nothing to do with retaining the insurance adjusters, nor did he take part in the processing or evaluation of the loss (T. 163).

To implicate Ivler in the Government's case, reliance was very heavily, if not exclusively, placed upon the testimony of Steven Cannold, the unindicted coconspirator. Cannold, who first testified before the grand jury on August 9, 1973, almost two years before the indictment was returned and more than two and one-half years after the event itself, was, indeed, the key and principal trial witness.

Cannold testified that he met with Anthony La Duca, Ivler's law partner, at a time in January, 1971 when Ivler asked to speak to him (T. 184). Still at the law offices of Ivler and La Duca, Cannold said he met with Robert Sorge and Ivler (T. 185). Ivler, according to Cannold, explained that Sorge, the owner of a chain of health spas known as Figure-Tone, wanted his health spas bombed or destroyed for insurance purposes (T. 185). After some bargaining over the price, Cannold agreed to do three spas for a total price of $7,500.00 (T. 186). Ivler was to hold the money until the job was completed (T. 186). Cannold indicated that he could not handle the jobs himself, but would contact someone else who could (T. 186).

Subsequently, Cannold contacted Peter Crusco who had experience with explosive devices and discussed the method of fire bombing the health spa premises (T. 190). A few days later, as Cannold testified, another meeting was held at Ivler's law office to review the understanding among himself, Sorge, Ivler and Crusco and the $7,500.00 was agreed upon as a firm figure (T. 192). The meeting continued at the Cabana Club, a bar next door to the building in which the law offices were located at 26 Hamilton Street, Paterson, New Jersey (T. 192).

Cannold testified that, a few days thereafter, another meeting took place at the Jailhouse Lounge in Paterson with the majority of conversation between Sorge and Crusco, Ivler not staying very long on that occasion (T. 193 to A. 194). Cannold further stated that he had discussed Ivler's holding of the $7,500.00 and of even accompanying Ivler to the bank down and across the street from his law office to put the $7,500.00 in a safe deposit box for safekeeping (T. 195 to T. 196). Following this, Cannold saw Crusco and confirmed that Ivler had the money (T. 196). Crusco, rather than try to do the job by himself, suggested that Lou Cennimo go with him and Cannold had no objection (T. 196 to T. 197).

While Cannold did not go to the spa on the evening it was bombed, he waited for Crusco at Crusco's house (T. 198). Returning with two pizza pies, Crusco, along with Cennimo, indicated that the job had been done, according to Cannold's testimony, and they had waited at a nearby pizza parlor until the explosion had taken place (T. 199).

The following day Cannold went to see Ivler at his law office for payment (T. 200). Supposedly, Ivler took out

$3,500.00 for a 1970 Cadillac Eldorado that Cannold had purchased from him, plus $1,000.00 as a charge for holding the money (T. 200). Of the $7,500.00 agreed upon, $3,000.00 was paid to Cannold even though only one spa "had gone up" instead of the agreed upon three (T. 200). As for the 1970 Eldorado, neither Cannold's nor Ivler's name appeared in the chain of title although Ivler held a lien on the car when title was in the name of one John Marshall (T. 203). According to Cannold, he kept none of the $3,000.00, but gave it all to Crusco who, in turn, said he would give half to Cennimo (T. 203).

Cross examination of Cannold showed him to have been convicted of two counts of counterfeiting in February, 1973 where he received a consecutive three and two year federal custodial sentence (T. 210 to T. 211). Cannold also admitted to being convicted of state charges involving a concealed weapon, conspiracy and robbery in June, 1973 for which he received a suspended 1½ to 2 year sentence (T. 183). His aggregate five year counterfeiting sentence was reduced to three years in June, 1973 (T. 211). Both his sentence reduction and suspended term occurred prior to his actual grand jury appearance relating to this matter in August, 1973 (T. 358). He admitted, however, that he began cooperating with federal agents while he was at Danbury and following his initial incarceration at the West Street Detention Center beginning in February, 1973 (T. 353 to T. 355). A worthless check conviction in 1962 more than 10 years old at the time of trial, was a subject that the defense was not permitted to pursue on cross examination, the court sustaining the Government's objection (T. 216 to T. 217). The apparent rationale of the court below was that there was enough ammunition as to other convictions so that the jury will be able to savor the flavor of Cannold, or as the court put it borrowing from the classical expression: "Enough to enable them to make a discriminating appraisal of him." (T. 217).

At the same time Cannold was in jail in 1973, his wife was also incarcerated and while he denied it, episodes of homosexual behavior by her that he heard about were suggested as a compelling motivation for his willingness to cooperate (T. 450 to T. 452). On the other hand, Cannold said that he refused to cooperate because the federal officials could not guarantee to secure his wife's release (T. 359), but that they would see what they could do in trying to get his wife out of jail if he cooperated (T. 360 to T. 361).

Cannold denied that he knew he would not be indicted if he testified before the grand jury and was aware of the fact that he was an unindicted coconspirator (T. 361 to T. 362). He admitted, however, that he was advised by the attorney questioning him in August, 1973 that in all probability, the grand jury would not indict him (T. 363). Following his testimony before the grand jury, he returned to Danbury briefly and was then transferred to another location (T. 356 to T. 357). During this time, he received for a year on a regular basis beginning in February or March, 1973 subsistence checks from the Government (T. 336).

Cannold, faced with a five year federal jail sentence, the prospect of additional time from the State for unrelated offenses and the anxiety over his wife's confinement and what was happening to her, was a ripe subject for cooperation. A tape recording of a phone conversation that Cannold had with Peter Crusco in June, 1974 which the Govenment turned over within the week prior to trial as *Brady* material showed just how vulnerable Cannold

was in retrospect (T. 209, T. 261).[1] Indeed, Cannold was not above perjuring himself given the pressure he was under when he began cooperating with the Government in early, 1973 (T. 302 to T. 335). He admitted, for example, that it was possible that he changed his version of things to the Justice Department (T. 309). He did not recall that he might have said in his conversation with Crusco that if two people swear to the same lie there is corroboration (T. 318 to T. 322).

No other testimony corroborated Cannold except to the extent that Charles A. D'Arrigo was permitted to testify (T. 549 to T. 568). Prior to D'Arrigo testifying as to his conversations with Crusco, a named defendant who was not on trial, and about his own involvement in arranging a sale of dynamite from Crusco to a special agent (Forbes), there was an extended argument over the admissibility of these conversations and the subsequent sale of dynamite to Forbes (T. 549 to T. 568). In spite of the fact that Crusco's statements that he was owed a debt by Cannold and Crusco's admission that he dynamite bombed the Figure-Tone Spa in East Orange were not in furtherance of the conspiracy, the court, nonetheless, permitted them insofar as they went to the issue of Crusco's participation in any wrongdoing and were not binding on any of the defendants on trial (T. 560). The trial court provided such a limiting instruction (T. 571 to T. 572).

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[1] Unfortunately, the real impact of this tape was never felt by the jury because counsel cross examined Cannold on the basis of a transcript of the tape which itself was continually interrupted by side bar conferences (See T. 302 to T. 335). Many questions were finessed by Cannold in his answers when he responded that he did not recall his exact words and counsel did not have the tape played to see if it refreshed Cannold's recollection as to what he said.

Counsel for Ivler pointed out that Crusco had pleaded guilty to the conspiracy count and would, therefore, not have a Fifth Amendment privilege available to him if he were called to testify by the Government (T. 564). What the objection amounted to was that the Government could not choose to circumvent the right of confrontation by calling D'Arrigo instead of Crusco, nor could the court make up for the constitutional deficiency by a limiting instruction. (See T. 558 to T. 564). Asking the jury to limit the testimony in the light of how it impacted upon what was charged against Crusco when he was not even on trial made no sense.

D'Arrigo, who had a prior criminal record, then testified as to conversations that he purportedly had with Peter Crusco, the bomber who was recruited by Cannold. These conversations, not in furtherance of the conspiracy, related to Crusco admitting to the use of explosive devices before (T. 569), that he would use explosives for an arson of a building supported by steel girders such as the East Orange spa (T. 569), and that he had access to dynamite (T. 569). Crusco also indicated to D'Arrigo that Cannold owed him $2,000.00 for committing a bombing at the Figure-Tone Health Spa in East Orange in 1971 (T. 570). The court instructed the jury that Crusco's statements testified to by D'Arrigo were not binding on any of the defendants, but they should be evaluated only on how it impacts upon what is charged against Crusco who was not even on trial (T. 571 to T. 572).

D'Arrigo had arranged for a sale of dynamite by Crusco to one Joe Ford who was operating in an undercover capacity for the Government and whose real name was Joseph Forbes, a Special Agent (T. 572). On May 10, 1971, six sticks of dynamite at 60% strength were sold by Crusco to Ford (T. 573 to T. 576) Forbes also testified, identifying Crusco from a photograph, as the person from whom he bought the dynamite which was admitted into evidence (T. 579 to. T581). The jury was, likewise, advised by the court that an instruction similar to the one given on D'Arrigo's testimony would be applicable (T. 582).

Of the defendants, only Ivler testified. He denied having any conversation or conferences with Cannold; he denied having any conference with Cannold and Sorge at anytime during 1971 (T. 972) to T. 973). He denied meeting with Cannold at the Cabana Club (T. 977), and this testimony was corroborated by Eugene Dorobkowski, the owner of the Club who testified that he did not see Ivler and Cannold in the Club, in early 1971 (T. 805). In fact, Dorobkowski had prohibited Cannold from coming into the Club in late 1970 when Cannold and a friend had damaged the bar upholstery in the club (T. 802 to T. 803). Ivler denied paying any money to Cannold; he did not maintain a safe deposit box at the New Jersey Bank that Cannold had described going to in his testimony (T. 1029 to T. 1030). A spokesman for the bank confirmed that no safe deposit box was maintained under Ivler's name or the law firm's name for the years 1970 and 1971 (T. 885). As for the sale of 1970 Cadillac Eldorado, Ivler acknowledged that he owned the automobile briefly, having purchased it from an out of state owner; however, the automobile was in a serious accident within a few days after he bought it and before he would have put title in his name. Rather than incur the headaches of repairing it, he transferred it to Guy's Auto who were willing to make the repairs and had a potential buyer (T. 1009 to T. 1017). Until this was done, Ivler held a lien interest against the automobile which was paid off on February 1, 1971 according to the certificate of the Division of Motor Vehicles, State of New Jersey (T.

1012 to T. 1013, Ex. G-39). Ivler denied selling the car to Cannold (T. 1009).

Other witnesses for the defense, Roland Sorge, the defendant's brother and Bruce Grasing and Jerrice Walton, Figure-Tone employees documented that Cannold had demanded money from Sorge—as much as $10,000.00 on one occasion and $7,000.00 on another (T. 707, T. 757, T. 893 to T. 894). Unless the money was paid, both Sorge and his brother's families, according to Ronald Sorge's testimony, would suffer and they would never forget Cannold's name (T. 708).

III. The judgment order of the Court of Appeals for the Third Circuit

While it may be difficult to divine the rationale of the court below when it renders a judgment order, this particular order contained citations of authority in footnotes for the rejection by the court of the contentions raised by the petitioner. In rejecting the contention that:

> "(1) notwithstanding limiting instructions, the court erroneously allowed testimony which was admitted in derogation of the Sixth Amendment right of confrontation, as enunciated in *Bruton* v. *United States,* 391 U.S. 123 (1968). . . ." (App. 2a).

the Court of Appeals appeared to rely on two lines of authority in approving of the admissibility of Crusco's statements which were made to D'Arrigo and testified to by D'Arrigo even though Crusco was available to the Government as a witness. The first apparent basis for sustaining admissibility is bottomed on the coconspirator exception to the hearsay rule which is borne out by the following citations: Fed. R. Evid. 801(d)(2)(E), Wigmore on Evidence §1079; *United States* v. *Trowery,* 542 F. 2d 623, 626 (3d Cir. 1976) and *United States* v. *Williams,* 529 F. 2d 559 (8th Cir. 1976) (App. 2a). Unfortunately, reliance on this line of authority was clearly misplaced by the Court of Appeals. Before a statement may be admissible against a coconspirator it must be found to have been made during the course of and in furtherance of the conspiracy. The trial judge in admitting the testimony found that the statements were not made in furtherance of the conspiracy (T. 555-17 to T. 560-12). He factually rejected that theory of admissibility and his so called limiting instructions to the jury reenforced this rejection because the instruction would not have been necessary had the statements been admitted under the coconspirator exception to the hearsay rule under Fed. Rule of Evid. 801(d)(2)(E).

The second basis for admissibility is found under the rationale of *United States* v. *Lipowitz,* 407 F.2d 597, 602-03 (3d Cir.), *cert. denied sub. nom. Smith* v. *United States,* 395 U.S. 946 (1969). There, the court ruled that no *Bruton* violation existed where a co-defendant's name was never mentioned in the confession put into evidence. Apparently the trial judge was opting for this kind of rationale when he admitted the Crusco statements made to D'Arrigo at trial, insuring that the names of the defendants on trial were not specifically mentioned. While such an effort to comport with the *Lipowitz* line of cases may be viewed as commendable, the absence of an express mention of a co-defendant's name does not *ipso facto* mean that *Bruton* has not been violated. The test is one of inculpation and not a mechanical test of identification by name alone. The circumstances surrounding the admission of Crusco's statement through the witness D'Arrigo, interlocked the principals in the conspiracy that the Government charged and knotted them together just as they were grouped in the indictment caption itself which went into the grand jury room during deliberations. According to the Government, Sorge wanted to collect the insurance proceeds on the fire bombings of his Figure-Tone Spa, and Ivler was to hold the money for Cannold who, in turn, recruited Crusco to do the bombing. Crusco, in addition to bolstering the credibility of Cannold, became the key to tie the links in the conspiracy chain together, inculpating all of the coconspirators at the same time. He should have been produced as the Government's witness; there was no adequate substitute if the petitioner's right of confrontation was to be secured.

To the extent that *Lipowitz, supra,* at 603, fn. 19 and 20, may also be read as a "harmless error" decision on this point, that kind of backstop would be unpersuasive here. In *Lipowitz,* there was overwhelming evidence that the Ivy Hill Branch of the United States Savings Bank at Newark was robbed on March 28, 1967 and that three men participated in the robbery. For example, marked or "bait bills," taken from the bank, were found on Smith, the appellant in the *Lipowitz* case. *United States* v. *Lipowitz, supra,* at 598 to 603. Shorn of the testimony from D'Arrigo which introduced Crusco's statements, the Government's case turned on the testimony of Cannold, hardly someone to whom we could affix the same label of "overwhelming evidence". For that very reason, the conspiracy theme was played and replayed by the Government attorney in his summation and rebuttal remarks (T. 22.2-3 to 4; T. 22.4-14 to 17; T. 22.5-3 to 8; T. 22.6-24 to 7-5; T. 22-9 through 11-1; T. 22.12-20 to 23; T. 22.14-2 to 6, 11 to 14; T. 22.18-4 to 9; T. 22.20-4 to 7; T. 22.25-13 to 20; T. 22.40-15 to 19; T. 22.41-21 to 42-5; T. 22.48-12 to 20. "T. 22" refers to the trial transcript of December 22, 1975 followed by the page and line numbers). The emphasis in summation alone demonstrates how essential the

Crusco statements to D'Arrigo were in the Government's proofs.

Furthermore, an explanation for Cannold's truthfulness was said to lie in Crusco's admission to D'Arrigo that Crusco was the bomber (T. 22.40-10 to 41-3) and that Cannold could have stopped with implicating Crusco unless what Cannold said about the others, Sorge Ivler and Cennimo, was also true (T. 22.41-21 to 42-21). Clearly, the fact that Cannold's testimony was said to be corroborated in part by what Crusco said to D'Arrigo was used to bolster the whole of his testimony. Crusco's statements to D'Arrigo, therefore, served a dual purpose: one, they tied the conspiracy together; and (2) they bolstered Cannold's credibility. Harmless error, if the Court of Appears did in fact so view the situation, would have to contain an elasticity it does not possess for it to be bent to the facts of this case.

In rejecting the petitioner's second contention that:

> "(2) the district court erred in precluding the defense from cross examining the Government's principal witness about a prior conviction more than 10 years old. . . ." (App. 2a).

the Court of Appeals evidently relied upon Fed.R. Evid. 609(b) and *Butler* v. *United States,* 408 F. 2d 1103, 1104-05 (10th Cir. 1969). Neither authority referred to dealt with the constitutional implications of denying to an accused the right to confront the witness against him. In *Butler* v. *United States, supra,* at 1105, an opinion which predated the statutory authority controlling in the case at bar, the Tenth Circuit reasoned that the witness's credibility was impeached inasmuch as he admitted to having committed three felonies and it was not reversible error for the court to refuse further inquiry and development of extrinsic evidence into misdemeanor convictions. The confrontation thrust of an accused's right of cross examination argued to the Third Circuit here and enunciated by this Court in *Davis* v. *Alaska,* 415 U.S. 308 (1974) was nowhere mentioned or alluded to in the *Butler* decision. In citing *Butler,* the court below has never even come to grips with the issue raised here.

The statutory rule of 609 (b) adds no further support for the court's rejection of the error complained of in not allowing the accused to cross examine the principal witness against him on a conviction more than 10 years old. Of paramount significance as to whether the 10 year limitation should be relaxed is the notion that by adhering to the limit, an accused who has a stale conviction will be encouraged to take the stand. See, *United States* v. *Jackson,* 405 F. Supp. 938, 941, 942 (E.D.N.Y. 1975). Here, the reason for the relaxation of the 10 year limitation had absolutely nothing to do with encouraging the accused to take the stand for the limitation was directed at a Government witness. 3 Weinstein and Berger, *Weinstein's Evidence* (1975) §609[03] at 609-71 to 609-74; see also, *Gordon* v. *United States,* 383 F. 2d 936 (D.C. Cir. 1967), *cert. denied* 390 U.S. 1029 (1968). Since one of the principal objectives of the limitation could not be fulfilled when the limitation was not keyed to permitting the accused to make an unfettered decision as to assume the witness stand or not, there was virtually no reason why the rule should not have been relaxed.

REASONS FOR GRANTING THE WRIT

1. This Court's decisions in *Bruton* v. *United States* and *Barber* v. *Page* have not been correctly applied by the Court of Appeals for the Third Circuit when a witness available to the Government is not produced and the accused is implicated by the testimony introduced in derogation of the right of confrontation guaranteed by the Sixth Amendment.

It is recognized that the fact harmful error may have been committed in this case may still not lead this Court to exercise its discretionary power to review the judgment below. Although the petitioner here is an attorney and, aside from the stigma of conviction, stands to lose the very means by which he earns his livelihood, the considerations that motivate this Court to grant *certiorari* must necessarily be of boarder dimentions and national concern rather than limited to right a wrong in an individual case no matter how unjust or unfair the result.

The petitioner's conviction rests on the testimony of Steven Cannold. There are others like Cannold, who, as cooperating witnesses, are subsidized, as here, by the Government and are paraded in and out of our courtrooms testifying on behalf of the United States of America. How many innocents have been caught in the net cast by the testimony of these paid Government witnesses will, most likely, never come to the surface.

On the other hand, law enforcement rationalizes their use as a dirty tool to fight a dirty business. Some crimes, they would argue, could, like this one, only be solved by the cooperation of the so-called "insider" or accomplice. But the very acknowledgment that the Government witness is tainted should work to construct more safeguards for the accused rather than less. This recognition should become the starting point, not the terminus, for the protection of the accused.

That the cooperating, subsidized Government witness with jail time weighing heavily on his back represents a prime candidate for perjury is an ever present danger that cannot be seriously disputed, nor can it be casually regarded. To the extent that the United States Constitution can provide a check on this real and continuing danger, it should. And it is the confrontation clause embodied in the Sixth Amendment which can serve the purpose of this bulwark. The decisions of this Court in *Bruton* v. *United States,* 391 U.S. 123 (1968) and *Barber* v. *Page,* 390 U.S. 719 (1968) have indicated as much.

In *Barber* v. *Page,* the testimony found to violate the confrontation rights of the defendant was prior sworn testimony. The sworn testimony in *Page* was held improperly admitted because the witness could not be said to be unavailable without a demonstration that the State had attempted to produce him. By contrast here, the testimony is pure hearsay. Crusco was in the custody of the Attorney General and the Government could, therefore, very easily have produced him, but for its own reasons chose not to do so (Petitioner's Appendix 20a to 21a submitted in Court of Appeals). This was a classic violation of the petitioner's right to confront the Government's evidence.

Similarly, in *Bruton* v. *United States, supra,* this Court held that a defendant is denied his Sixth Amendment right to confrontation when the incriminating confession of a co-defendant is introduced, unless the accused is afforded an opportunity for cross examination of his co-defendant. Although the co-defendant whose statement was admitted into evidence through the witness, D'Arrigo, did not specifically mention the other defendants by name, the thrust of his testimony definitely chained them together through what he had to say about Cannold.

This case presents the unique opportunity for the Court to consider the inroads made by the various Federal Court of Appeals rulings that have found no *Bruton* violation where confessions and statements of a co-defendant have been introduced at trial with the redaction of all references to the defendants on trial and to assess the realistic viability of the redaction process in a concrete setting. See *e.g. United States* v. *Blassick,* 422 F. 2d 662 (7th Cir. 1969), *cert. denied,* 402 U.S. 985 (1971); *United States ex rel. Nelson* v. *Follette,* 430 F. 2d 1055 (2d Cir. 1970), *cert. denied,* 401 U.S. 917 (1971); *United States* v. *Alvarez,* 519 F. 2d 1052 (3d Cir. 1975), *cert. denied,* 423 U.S. 914 (1975); *United States* v. *Hicks,* 524 F. 2d 1001 (5th Cir. 1976) *cert. denied,* 424 U.S. 946 (1976). Additionally, the spectre of *Barber* v. *Page* hangs heavily over this case when the co-defendant has pleaded guilty, is not on trial when the statement is introduced, and the Government has made no showing as to his unavailability as a witness by reason of the fact that he was in custody of the Attorney General. Before the Government can seek to introduce less reliable accounts of a co-defendant's statements in a criminal trial, the burden of showing the witness' unavailability should be met. See, e.g. *Stewart* v. *Cowan,* 528 F. 2d 79, 84 (6th Cir. 1976). If the obligation to produce the witness can be constitutionally sidestepped by the Government, as it was here, then *Barber* v. *Page* has been dealt a lethal blow.

The trail blazed by *Bruton* v. *United States* and *Barber* v. *Page* should not be subject to detour. The continuing viability of these decisions is of the highest priority if the right of confrontation is to be made secure and the most reliable testimony is presented and tested by the rigors of cross examination in our courtrooms. *Certiorari* should be granted to consider the issue presented.

2. The interpretation of Federal Rule of Evidence 609(b) which limits the use of prior convictions beyond 10 years old for impeachment purposes is a matter that has not been, but should be, determined by this Court, particularly where it is the accused who seeks to impeach the Government's witness.

This Court in *Davis* v. *Alaska,* 415 U.S. 308 (1974) reaffirmed the principle that the accused's right of cross examination is included in the "right of confrontation" guaranteed by the Sixth Amendment. This constitutional concern interposes itself whenever an accused seeks to examine a Government witness about a prior conviction and runs directly into the 10 year limitation embodied in Fed. R. Evid. 609(b). The issue has not been considered by this Court. For that matter, this Court has not availed itself of the opportunity to address Fed. R. Evid. 609(b), leaving constitutional considerations to one side.

The facts of this case bring the issue into sharp relief. The Government witness sought to be examined about the worthless check charge, a crime of dishonesty, was the central figure in the Government's proofs.[2] His believability was absolutely crucial and anything that would further undermine his truthfulness was essential to the defense. To be sure, the witness, Cannold, did have other prior convictions about which he was questioned, but that should not have militated against examining him about an earlier conviction. On the contrary, it provides an even stronger reason for asking him because it shows his prior untrustworthiness.

As the final arbiter of the evidence rules, the guidelines provided by this Court could be of immeasurable help to the lower federal courts who have to apply this rule on a continuing and daily basis.

CONCLUSION

For the reasons herein, the petition for writ of certiorari should be granted.

Respectfully submitted,

Richard Newman
Counsel for Petitioner
1180 Raymond Boulevard, Suite 2045
Newark, New Jersey, 07102

Isles, Newman and Weissbard
Attorneys for Petitioner

[Appendices Follow]

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[2] Cannold pled guilty in the State court in 1962 to uttering a worthless check in violation of N.J.S. 2A:111-15. The offense requires an intent to defraud for a conviction. *State* v. *Covington,* 113 N.J. Super. 229, 273 A.2d. 402 (App. Div. 1971), affirmed, 59 N.J. 536, 284 A.2d. 532 (1971). Where it is established that there were no funds or insufficient funds in the account at the time the person made or delivered the check, a presumption of an intent to defraud comes into play under NJ.S. 2A:111-16, but that does not reduce the burden of the prosecution to prove an intent to defraud not does it change the essential dishonest nature of the act. *State* v. *Pollack,* 43 N.J. 34, 202 A.2d. 433 (1964).

APPENDIX A

Judgment Order of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 76-1399 & 76-1400

◆

UNITED STATES OF AMERICA,

v.

ROBERT SORGE, J. GEORGE IVLER, LOUIS J. CENNIMO,
PETER A. CRUSCO,

J. George Ivler, Appellant in No. 76-1399.

Louis J. Cennimo, Appellant in No. 76-1400.

(D. C. Crim. No. 75-349)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

◆

Submitted under 3rd Cir. Rule 12(6) January 7, 1977

Before Van Dusen and Adams, *Circuit Judges,*
and Weiner, *District Judge**

Richard Newman, Esq.,
Newark, New Jersey,
Attorney for Appellant Ivler

Roger A. Lowenstein, Esq., Federal Public
Defender, Newark, New Jersey,
Attorney for Appellant Cennimo

Jonathan L. Goldstein, U. S. Attorney;
John J. Barry, Assistant U. S. Attorney;
James A. Plaisted, Assistant U. S.
Attorney;
Newark, New Jersey,
Attorneys for Appellee

After considering the contentions raised by appellants, to wit, that:

(1) notwithstanding limiting instructions, the court erroneously allowed testimony which was admitted in derogation of the Sixth Amendment right of confrontation, as enunciated in *Bruton* v. *United States,* 391 U. S. 123 (1968);[1]

(2) the district court erred in precluding the defense from cross-examining the Government's principal witness about a prior conviction more than 10 years old;[2]

(3) the defense motion for a mistrial based on the clearly improper questioning by the Government attorney should have been granted; the court's instruction could not erase the prejudice;[3]

(4) a new trial should be granted in view of the Government's failure to file affidavits, as directed by the trial judge, supporting the in-court representation as to the absence of any other material as to the witness D'Arrigo beyond what was turned over at the time of trial;[4] and

(5) the evidence was insufficient to prove that Ivler aided and abetted on any of the substantive counts, and the motion for judgment of acquittal as to these counts should have been granted;[5]

it is

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* Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

[1] Fed. R. Evid. 801(d)(2)(E); Wigmore on Evidence § 1079; *United States* v. *Trowery,* 542 F. 2d 623, 626 (3d Cir. 1976); *United States* v. *Lipowitz,* 407 F. 2d 597, 602-03 (3d Cir.), *cert. denied sub. nom. Smith* v. *United States,* 395 U. S. 946 (1969); *United States v. Williams,* 529 F. 2d 559 (8th Cir. 1976).

[2] Fed. R. Evid. 609(b); *Butler* v. *United States,* 408 F. 2d 1103, 1104-05 (10th Cir. 1969).

[3] *United States ex rel. Perry* v. *Mulligan,* No. 75-2332 (3d Cir., Nov. 5, 1976), at 11.

[4] *United States* v. *Kahaner,* 317 F. 2d 459, 473 (2d Cir.), *cert. denied sub. nom., United States* v. *Corallo,* 375 U. S. 836 (1963); *Rosenberg* v. *United States,* 360 U. S. 367 (1959).

[5] *Glasser* v *United States,* 315 U. S. 60, 80 (1942); *United States* v. *DeCavalcante,* 440 F. 2d 1264, 1273 (3d Cir. 1973).

Appendix A

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed

By the Court:

VAN DUSEN
Circuit Judge

Attest:

THOMAS P. QUINN
Clerk

Dated: January 12, 1977

APPENDIX B

Order Staying Issuance of Mandate of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1399

UNITED STATES OF AMERICA,

vs.

ROBERT SORGE, J. GEORGE IVLER, LOUIS J. CENNIMO
and PETER A. CRUSCO,

J GEORGE IVLER,

Appellant.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until February 11, 1977.

FRANCES L. VAN DUSEN
Circuit Judge

Dated: January 26, 1977